Supreme Court, U.S.
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In The

Supreme Court of the United States

PAUL BIGHAM,

Petitioner,

v.

LADDIE HUFFMAN, SHERIFF OF CLAY COUNTY, MISSISSIPPI, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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28pp

QUESTIONS PRESENTED

1. Does the rule of *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (2000) that employment discrimination cases can be proven by indirect evidence, also mean that First Amendment retaliation cases can be proven by indirect evidence?

2. Is direct evidence required to prove that one was arrested because of First Amendment free speech rights?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

a. Paul Bigham, Plaintiff/Appellant;

b. Laddie Huffman, Defendant/Appellee;

c. Jim Waide, Attorney for the Plaintiff/Appellee;

d. Wendell Trapp, Attorney for the Defendant/Appellant; and

e. Clay County, Mississippi.

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OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Mississippi and the Order affirming it by the Court of Appeals for the Fifth Circuit were unreported. They are attached in the Appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on June 2, 2000, by Writ of Certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . .

The United States Constitution, Amendment One provides: "Congress shall make no law . . . abridging the freedom of speech . . . ".

The United States Constitution, Amendment Four provides:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause . . .

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .

STATEMENT OF THE CASE

Petitioner Paul Bigham, a former chief deputy sheriff of Clay County, filed his Complaint against the Clay County Sheriff, individually, and Clay County, Mississippi, to recover damages for arrest without probable cause in violation of the Fourth Amendment, and arrest because of exercise of free speech rights in violation of the First Amendment. R. Vol. 1, pp. 1-6.

On October 8, 1999, the District Court for the Northern District of Mississippi granted the Motion for Summary Judgment filed by Defendants Clay County Sheriff Huffman and Clay County, Mississippi on grounds of insufficient evidence. *Id.* at 365-370.

While the District Court's decision predated *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (2000), the Fifth Circuit affirmed based upon the district court's opinion without citing *Reeves*.

STATEMENT OF THE FACTS

The following facts are from Bigham's affidavits, depositions and interrogatories. Consistent with *Reeves*, 120 S.Ct. at 2110, any evidence of movant, contradicted by non-movant's evidence, is disregarded.

Commencing in the summer of 1995, Petitioner Bigham began receiving information from jail inmates that the Defendant Sheriff was utilizing inmate labor at the jail for private gain. R. Vol. 1, pp. 251-253. Bigham confirmed this information by walking on the public street behind the jail and observing inmates working on private vehicles, and constructing barbeque grills. *Id.* at 253. Bigham relayed this information to the public through numerous newspaper reports and letters to the editor, charging the Sheriff with the illegal use of inmate labor. *Id.* at 255, 262-264. Additionally, he reported the Sheriff's misconduct to several public officials. *Id.* at 254-255, 262-264, 311-313.

At the time of Bigham's arrest by the Sheriff, there was no policy against members of the public using the street behind the jail. *Id.* at 297. In fact, the street behind the jail provided access to county offices, such as the Department of Human Services and the 4H Club, and was used by the public in general. *Id.* at 268.

On July 9, 1997, the day after Bigham had written a letter to the editor about the Sheriff's illegal activity, Sheriff Huffman confronted Bigham while he was on the public street behind the jail. The Sheriff shook his finger in Bigham's face and told him, "I've had all of you I'm going to take," and promised to arrest Bigham if he came into the area behind the jail again. *Id.* at 255. As Bigham

walked away from the Sheriff, the Sheriff nearly ran over him in the Sheriff's law enforcement vehicle. *Id.* at 262-263.

Later that same day, Bigham returned with a camera and drove his private vehicle onto the street behind the jail, hoping to obtain a picture of the inmates doing work for the Sheriff's private gain. When Bigham arrived back at his home, the Sheriff confronted him and arrested him for trespassing and disorderly conduct. The Sheriff directed that Bigham could be released from jail only if he posted a *cash* bond. *Id.* at 262-263.

After the district attorney failed to prosecute the criminal charges brought by the Sheriff against Bigham, Bigham commenced this action, alleging he was arrested in retaliation for exercise of his First Amendment Rights, and without probable cause.

The District Court dismissed the First Amendment Claim, on the grounds that Bigham lacked any direct evidence that his free speech was the cause of his arrest. The district court noted Bigham's admission that he has "never heard any statement or seen any document that would lead him to believe Huffman arrested him in retaliation for his speech." District Court Opinion, pp. 4-5.

The Fifth Circuit affirmed the grant of summary judgment by incorporating the District Court's pre-*Reeves* opinion. Bigham requests this Court hear the case because the decision of the Fifth Circuit Court of Appeals contravenes the *Reeves'* holding that indirect evidence is not necessary to prove illegal motive.

REASON FOR GRANTING THE PETITION

I.

THE WRIT SHOULD BE GRANTED BECAUSE THE DISTRICT COURT'S DECISION IS INCONSISTENT WITH *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, ___ U.S. ___, 120 S.CT. 2097 (2000) AND WITH THE MAJORITY OF THE CIRCUITS WHICH HOLD THAT DIRECT EVIDENCE IS NOT REQUIRED TO PROVE AN ILLEGAL INTENT.

The District Court Opinion, affirmed by the Fifth Circuit, makes clear that Bigham's case failed because he did not present direct evidence that his arrest was caused by his speech. District Judge Davidson's opinion of October 8, 1999, says: "On the contrary, Bigham admitted during his deposition that he never heard any statement or seen any document that would lead him to believe that Huffman arrested him in retaliation for his speech."

This holding, that direct evidence, such as a "statement" or a "document," to prove illegal intent is required, contravenes *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (2000). *Reeves* holds that indirect evidence *is* sufficient to prove discriminatory intent. Contrary to the view of some of the circuit courts of appeals, *Reeves* held direct evidence is not necessary to prove employment discrimination, but that indirect evidence from which a jury could infer discriminatory intent is sufficient. Recognizing that "there will seldom be eye witness testimony to the employer's mental processes," *Reeves* rejected the Fifth Circuit's requirement of direct evidence. *Reeves* at 2105.

Notwithstanding *Reeves*, the Fifth Circuit, in this case, again held that direct evidence was required in the

form of "statements" or a "document" in a First Amendment retaliation case. However, there is no basis upon which to distinguish *Reeves* from this case. Just as "there will seldom be eye witness testimony to the employer's mental processes" when he fires an older plaintiff, *Reeves* at 2105, there will seldom be eye witness testimony that the sheriff was retaliating because of exercise of First Amendment Rights when he made an arrest.

The type of indirect evidence relied upon in *Reeves* is identical to the evidence relied upon by Bigham in this case. In *Reeves*, this Court noted that plaintiff, who was suing for age discrimination, had been treated differently from younger employees. This is one type of evidence, which Petitioner produced in this case. Bigham produced evidence that the public generally used the road behind the jail, without being arrested by the Sheriff. However, when Bigham used the same road other members of the public used for the purpose of taking pictures of illegal activity by the Sheriff, and after writing letters criticizing the Sheriff, Bigham was arrested.

That *Reeves* is not limited to employment discrimination cases is demonstrated by *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). In *Adickes*, the lower federal courts had approved a grant of summary judgment, where plaintiff (who had participated in a sit-in) had no direct evidence that the sit-in was the reason for the arrest.

This Court however, held that the close proximity in time between participation in the sit-in and the arrest was sufficient to permit a fact-finder to infer a retaliatory intent, even though there was no direct evidence. *Adickes*,

therefore, reversed a grant of summary judgment in favor of defendant.

Similarly, in *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1552 (1999), there was no direct evidence of racial discriminatory intent in drawing a gerrymandered district. This Court did not require such direct evidence of intent, but said that the fact-finder could infer intent from the gerrymandering. This Court wrote:

> . . . Reasonable inferences from the undisputed facts can be drawn in favor of a racial motivation or in favor of political motivation finding . . . [I]t was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage.

119 S.Ct. at 1552.

Here, a fact-finder can resolve the disputed issue of motivation either by crediting the Sheriff's testimony that he was legitimately arresting Bigham for trespassing, or can infer that the real reason for the arrest was because of the exercise of free speech. Just as in *Hunt v. Cromartie*, this is a jury question. As this Court stated in *Morissette v. United States*, 342 U.S. 246, 274 (1952):

> However clear the proof may be, or however incontravertable it may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury.

The Fifth Circuit's decision is inconsistent with the *Reeves* emphasis on the necessity of drawing all reasonable inferences in favor of the non-moving party. *Reeves* states:

> . . . [T]he Court must draw all reasonable inferences in favor of the nonmoving party . . . [T]he . . . drawing of legitimate inferences from the facts are jury functions . . .

Reeves, 120 S.Ct. at 2110.

By affirming on the basis of the pre-*Reeves* district court opinion, the Fifth Circuit neglects this fundamental lesson of *Reeves*. Had the trial court drawn all reasonable inferences in favor of Bigham, there would have been an issue of material fact as to whether Bigham was arrested for exercise of First Amendment Rights. For example, Bigham was arrested the day after he had written his latest letter to the editor criticizing the Sheriff's illegal activities. He was arrested for being on property which everyone else is free to use. If reasonable inferences are drawn in favor of the non-movant, it could be inferred that he was arrested because he had exercised his First Amendment Rights by writing the letters to the editor.

One can reconcile this case and *Reeves* only by assuming that there is some unstated distinction between employment discrimination cases, and First Amendment retaliation cases. It has long been clear in the case of employment discrimination cases, that one can draw an inference of discrimination from the fact that an adverse action is taken shortly after exercise of a protected right. *See*, for example, *Mathews v. Triology Communications, Inc.*, 143 F.3d 1160, 166 (11th Cir. 1988) (causality between the termination and participation in a self-insured medical plan can be established by circumstantial evidence, such as proof that the discharge followed an exercise of protected right so closely in time as to justify an inference of retaliatory motive).

In disregarding the fact that Bigham's arrest followed immediately after his exercise of free speech rights, the Fifth Circuit obviously believes that the close connection in time method of proof does not apply in First Amendment retaliation cases. Yet, there is no basis for their distinction between First Amendment cases and employment discrimination cases.

Other Fifth Circuit cases have also granted summary judgment or directed verdicts despite the presence of issues of intent. *See Gallery v. Domtar Industries, Inc.*, 95 F.3d 1320, 1326 (5th Cir. 1996) (the presence of an intent issue does not automatically preclude summary judgment); *Budenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 956 n. 3 (5th Cir. 1993) (summary judgment is never precluded because state of mind is at issue); *Vadie v. Mississippi State Univ.*, ___ F.3d ___, ___ (5th Cir. 2000) (98-60784) (holding, contrary to *Reeves*, that circumstantial evidence including *prima facie* case, proof that plaintiff was far better qualified than successful applicant, and falsity of reasons for employment decision was insufficient to create a jury issue of race/national origin employment discrimination).

The Fifth Circuit's continuing requirement of direct evidence of the state of mind is inconsistent both with the teachings of this court, and those of other circuits. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716-17 (1993) ("The state of a man's mind is as much a fact as the state of his digestion"); *Young v. Quinlan*, 960 F.2d 351, 360 n. 21 (3rd Cir. 1992) ("a party's state of mind is inherently a question of fact which turns on credibility"); *Wren v. Spurlock*, 798 F.2d 1313, 1317 (10th Cir. 1986) (in a retaliation case the question of

whether the action was motivated by plaintiff's exercise of Constitutional Rights, "raises a question of fact for the jury"); *Wilson v. Seiter*, 893 F.2d 861, 866 (6th Cir. 1990) ("inasmuch as a determination of someone's state of mind usually entails the drawing of factual references as to which reasonable men might differ – summary judgment is inappropriate").

Of course, requiring direct evidence of the state of mind transfers the power to decide cases from a judge to a jury. The rationale of *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 501 (1959), thus applies:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

See Patricia Ann Wall, *Summary Judgment at 60*, 76 Tex. L. Rev. 1897, 1989 (1998), which said:

> Summary judgment has assumed a much larger role in civil case dispositions than its traditional image portrays, or even the test of Rule 56 would indicate, to the point where fundamental judgments about the value of trials and especially trials by jury may be at stake. A reassessment of Rule 56 and its erratic history may be in order, lest it develop into a stealth weapon for clearing calendars.

See also, Ann C. McGinley, *Credulous Courts in the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADA Cases*, 34 B.C.L. Rev. 303, 307 (1993) (lower court have granted summary judgment in cases where there exist questions of fact concerning motive, thereby denying plaintiffs their "day in court" as promised by the

American Model of Litigation); Ruth Coker, *The American With Disabilities Act: A Windfall for Defendants*, 34 Harv. L. Rev. 99 (1999) (by labeling almost all questions under the Americans With Disabilities Act to as questions of law, trial judges have granted summary judgments or motion to dismiss in four hundred and forty-eight (448) of four hundred and seventy-five (475) cases (ninety-four percent (94%) of Americans With Disabilities Act cases); Eric Schnapper, *Judges Against Juries: Appellant Review of Federal Jury Verdicts*, 1989 Wis. L. Rev. 237, 248-49 (1989) (statistical evidence indicates grants of summary judgments are much higher in civil rights cases than other types of litigation); Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. Law. Rev. 639, 671-77 (1973) (the Seventh Amendment was adopted because of fear that life tenured federal judges would favor the "money class"); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception and Politics of the Civil Jury*, 80 Corn. L. Rev. 325, 328 (1995) ("The marginalzation of the jury undermines a democratic vision of full participation and may discourage citizen respect for the legal system in general").

CONCLUSION

By neglecting to discuss *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (2000) when affirming the district court's pre-*Reeves* grant of summary judgment, the Fifth Circuit Court of Appeals has manifested an intent to either narrowly construe or ignore *Reeves*.

This Court should grant the Writ and set the case for oral argument. Alternatively, this Court should grant the Writ and remand for reconsideration in view of *Reeves*.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60724
Summary Calendar

PAUL BIGHAM,

Plaintiff-Appellant,

versus

LADDIE HUFFMAN, Sheriff of Clay County, Mississippi, in his official and individual capacity,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi
(D.C. No. 1:98-CV-208-D-D)

(Filed Jun. 02, 2000)

Before REAVLEY, BARKSDALE and STEWART, Circuit Judges.

PER CURIAM:*

We affirm for the reasons given by the district court in its opinion dated October 8, 1999.

AFFIRMED.

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

PAUL BIGHAM, PLAINTIFF

vs. No. 1:98cv208-D-D

LADDIE HUFFMAN, Sheriff of Clay County, MS, in his official and individual capacities, DEFENDANT

OPINION

(Filed Oct. 12, 1999)

Presently before the court is the Defendant's motion for summary judgment. After careful consideration, the court finds that the motion should be granted.

Factual Background

The Plaintiff, Paul Bigham ("Bigham"), was a deputy sheriff in Clay County, Mississippi, from January 1992 until September 1995. Upon his termination from that position, Bigham began making statements, including writing letters to a local newspaper, voicing his opinion about the job performance of his erstwhile supervisor, Clay County Sheriff Laddie Huffman ("Huffman"). Among other topics, Bigham's statements and letters chided Huffman for using inmate labor inappropriately, including to wash privately owned vehicles.

As part of his activities, Bigham would walk or drive along a rear driveway of the Clay County Jail. This enabled him to stand within a couple of feet of the rear of the jail complex where he would attempt to observe

inmate activity taking place inside the jail. On July 9, 1997, despite having been previously warned by Huffman to stay away from the rear area of the jail, Bigham took a walk along the driveway and peered into the jail. Huffman, who was driving along the driveway, saw Bigham and again warned him to stay off the driveway or he would be arrested for trespassing. Bigham left the area but returned minutes later in his vehicle. Huffman, after watching Bigham drive through the area, followed Bigham and arrested him for trespass and disorderly conduct – failure to obey the lawful command of a law enforcement officer. Bigham was confined in the Clay County Jail for about twelve hours and was released.

Since that time, Bigham, who has not been cited or arrested since the July 1997 incident, has continued his verbal and written campaign concerning the conduct and fitness of Huffman to serve as the Sheriff of Clay County. Bigham filed this action in July 1998 claiming that his arrest violated the First and Fourth Amendments to the United States Constitution. Now, Huffman has moved for summary judgment.

Summary Judgment Standard

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden then shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions,

answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.*, 477 U.S. at 324. While all legitimate factual inferences must be viewed in the light most favorable to the non-movant, Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986); *Celotex Corp.*, 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

Discussion

A. Arrest Without Probable Cause

The Fourth Amendment to the United States Constitution provides that citizens have the right to be free from arrest without probable cause. *Mangieri v. Clifton*, 29 F.3d 1012, 1016 (5th Cir. 1994). Whether an arresting officer had probable cause depends on whether, at the time of the arrest, the facts and circumstances within the officer's knowledge would support a reasonable person's belief that the arrested individual had committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L. Ed.2d 142 (1964); *Hart v. O'Brien*, 127 F.3d 424, 444 (5th Cir. 1997). Bigham asserts that his arrest for trespass and disorderly conduct – failure to obey the

lawful command of a law enforcement officer was without probable cause. The undisputed facts, however, indicate otherwise; no genuine issue of material fact regarding this claim exists and Huffman is entitled to judgment as a matter of law.

Section 97-17-97 of the Mississippi Code provides that "any person [who goes] upon . . . the land of another, after having been forbidden to do so, . . . shall be guilty of a misdemeanor." The driveway that Bigham utilized is indisputably located on Clay County property and has never been dedicated by the County as a public thoroughfare. Additionally, Bigham was on notice that the area was off-limits because Huffman had previously forbidden him from coming into the area. The facts and circumstances within Huffman's knowledge at the time of Bigham's arrest were that Bigham came upon County property after having been forbidden to do so – thereby committing the offense of trespass. Clearly, Huffman had probable cause to arrest Bigham for trespass since the facts and circumstances within Huffman's knowledge at the time of Bigham's arrest would support a reasonable person's belief that Bigham had committed the offense of trespass.

Likewise, probable cause existed for Huffman's arrest of Bigham for disorderly conduct – failure to obey the lawful command of a law enforcement officer. Section 97-35-7 of the Mississippi Code provides that "whoever, . . . under such circumstances as may lead to a breach of the peace, . . . fails or refuses to promptly comply with or obey a request, command, or order of a law enforcement officer, . . . shall be guilty of disorderly conduct, which is made a misdemeanor." Indisputably,

Bigham refused to comply with Huffman's request for Bigham to leave the area behind the jail and not return. Likewise, the circumstances surrounding this incident are such that a breach of the peace may have occurred. At the time of the arrest, Huffman was aware both these facts. So, at the time of the arrest, the facts and circumstances within Huffman's knowledge would support a reasonable person's belief that Bigham had committed the offense of disorderly conduct. Hence, probable cause for Bigham's arrest existed.

Based on the foregoing, the court finds that there is no genuine issue of material fact regarding this claim and Huffman is entitled to judgment as a matter of law.

B. First Amendment Retaliation

In order to establish a *prima facie* case of retaliation under the First Amendment, Bigham must show that:

(1) the defendant was acting under color of state law;

(2) the plaintiff engaged in activity that is protected under the First Amendment; and

(3) the plaintiff's exercise of his First Amendment rights was a substantial or motivating factor for the defendant's actions.

Harrington v. Harris, 118 F.3d 359, 365 (5th Cir. 1997).

No dispute exists as to Bigham's ability to show that elements one and two are true. However, Bigham has not submitted any evidence or identified any genuine issues of material fact as to the third element and, based on the

undisputed facts, summary judgment on this claim in favor of Huffman is appropriate.

Bigham bears the burden of setting forth specific facts showing that there is a genuine issue for trial; to that end, he has presented no competent evidence as to whether his exercise of his First Amendment rights were a substantial or motivating factor for Huffman's actions. Aside from Bigham's conclusory and insufficient allegations of retaliation, there is no indication in the record that Bigham's exercise of his First Amendment rights motivated Huffman's actions. On the contrary, Bigham admitted during his deposition that he has never heard any statement or seen any document that would lead him to believe that Huffman arrested him in retaliation for his speech. In light of Bigham's failure to set forth sufficient specific facts showing that a genuine issue for trial exists, there is no disputed issue of material fact and Huffman is entitled to judgment as a matter of law on this claim.

A separate order in accordance with this opinion shall issue this day.

This the 9th day of October 1999.

/s/ Glen H. Davidson
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

PAUL BIGHAM, PLAINTIFF

vs. No. 1:98cv208-D-D

LADDIE HUFFMAN, Sheriff of Clay County, MS, in his official and individual capacities, DEFENDANT

ORDER

Pursuant to an opinion issued this day, it is hereby ORDERED that

(1) the Defendant's Motion for Summary Judgment is GRANTED;

(2) all remaining pending motions are DENIED AS MOOT; and

(3) this case is CLOSED.

All memoranda, depositions, declarations and other materials considered by the court in ruling on these motions are hereby incorporated into and made a part of the record in this action.

SO ORDERED, this the 9th day of October 1999.

/s/ Glen H. Davidson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60724
Summary Calendar

D.C. Docket No. 1:98-CV-208-D-D

(Filed Jun. 2, 2000)

PAUL BIGHAM

Plaintiff-Appellant

v.

LADDIE HUFFMAN, Sheriff of Clay County, Mississippi, in his official and individual capacities

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen.

Before REAVLEY, BARKSDALE and STEWART, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JUN 28 2000

Supreme Court, U.S.
FILED
SEP 20 2000
CLERK

(2)

No. 00-298

IN THE

Supreme Court of the United States

PAUL BIGHAM,

Petitioner,

v.

LADDIE HUFFMAN, SHERIFF OF CLAY COUNTY, MISSISSIPPI, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Relevant Factual Elements

In 1992, Respondent Sheriff Laddie Huffman hired Petitioner Paul Bigham as chief deputy of the Clay County, Mississippi Sheriff's Department. Because of Petitioner's poor job performance and many problems he caused, Respondent Huffman terminated Petitioner's employment in 1995. This is not an employment case, however, but is a case alleging wrongful arrest/First Amendment retaliation. Over the next two years, Petitioner wrote a number of derogatory "letters to the editor" about Respondent Huffman in a local "tabloid" newspaper which assailed Respondent's character and accused Respondent of misconduct in office.

During this same two-year period, Petitioner repeatedly came upon the Clay County jail premises to harass inmates. (R. 209-210). For example, Petitioner cursed at inmates and threatened inmates by saying that he would have them sent to the state penitentiary. (R. 209-210). Further, Petitioner harassed inmates by disrupting their work and sleep by repeatedly walking and driving upon a restricted driveway area behind the Clay County jail building. (R. 209-210).

This driveway is located immediately behind the Clay County jail building and is situated exclusively upon Clay County property. (R. 193-94, 201-202). Such driveway serves as the only means of access to the back of the Sheriff's Department/jail building and is the entry point for new inmates to be brought into the jail for booking following arrest. (R. 196-97). Such driveway is separated from an inmate work area only by a chain link fence. (R. 196-97). This driveway is a restricted area not open for public use

because of the danger that members of the public could pass weapons or contraband to inmates through the chain link fence, and because of the danger that inmates could pose to members of the public. Petitioner knew that the driveway was not open to public use, for he himself, while chief deputy, told people not to walk upon it. (R. 133-34).

Although Petitioner refers to this driveway as a "street," such is clearly a misstatement of the true character of the driveway. Clay County land records show that the driveway is located upon property owned by Clay County, and upon which is situated the Clay County jail. (R. 201). This was admitted by Petitioner in his deposition. (R. 152). Such driveway does not appear on any land map or plat of Clay County or the City of West Point, Mississippi (where the jail is located). (R. 201). In fact, the parties stipulated in the Pre-Trial Order that the driveway has never been dedicated as a public street or county road. (R. 345). Contrary to Petitioner's argument, this driveway is clearly *not* a public street.

Respondent Huffman repeatedly warned Petitioner not to come upon the driveway behind the jail building or he (Petitioner) would be arrested for trespassing. (R. 148, 197). Respondent Huffman gave such warnings under the authority granted to him by Mississippi Code Annotated § 19-25-69 (1972, as amended), which places upon sheriffs the duty to preserve the premises of the county jail from trespassers and intruders. In various "letters to the editor," Petitioner admitted to having received these warnings. (R. 163, 169).

On July 9, 1997, Petitioner again walked upon the driveway, stopped, and harassed inmate Jessie Minnefield. (R. 136, 139-45, 212). Respondent Huffman once more

warned Petitioner that if he (Petitioner) came upon the driveway again, he would be arrested for trespassing. (R. 148, 188, 212). Petitioner left the area but returned within a matter of minutes in his truck. (R. 144, 212). Because Petitioner again refused Respondent Huffman's warnings to cease trespassing upon the driveway behind the jail building, Respondent Huffman discharged his statutory duty under Miss. Code Ann. § 19-25-69 and arrested Petitioner for trespassing and disorderly conduct — failure to obey the request or command of a law enforcement officer. Petitioner claims that retaliation can be inferred because his arrest occurred "the day after he had written his latest letter to the editor criticizing the Sheriff." (Pet. 8). To the contrary, the Record actually reflects that although Petitioner had been writing letters for nearly two years, Petitioner had not written a letter in the ten-week period preceding his arrest. (R. 352).

Following Petitioner's arrest, he was booked and placed into the Clay County jail. Petitioner was released the following day. Although Petitioner was not brought to trial for the offenses of trespassing and disorderly conduct, the reason therefor had nothing to do with the merits of the charges. It appears that in transferring Petitioner's case from the Clay County Justice Court to the district attorney, which transfer was due to Petitioner's assertion of a conflict of interest with the county prosecutor, Petitioner's criminal file was either not transferred or not received by the district attorney. (R. 203, 207, 211). What is clear is that there was *never* a decision made by either the county attorney or district attorney to dismiss the case or drop the charges against Petitioner. (R. 204, 207-08). Respondent Huffman took all the ordinary and necessary steps to have Petitioner prosecuted on the trespass and disorderly conduct charges, (R. 199, 206-07), and once such was done, Petitioner's prosecution was out of Respondent's hands.

Following his arrest for trespassing and disorderly conduct, Petitioner continued writing "letters to the editor" critical of Respondent Huffman. (R. 352-53). In fact, Petitioner published another article about Respondent on July 16, 1997, one week after his arrest. (R. 352).

PERCEIVED MISSTATEMENTS OF FACT OR LAW IN THE PETITION THAT BEAR ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT IF CERTIORARI WERE GRANTED.

The instant Petition is based upon a number of misstatements of fact. The first is Petitioner's patently false statement concerning the time period which elapsed between Petitioner's speech and arrest. Petitioner claims an inference of intentional retaliation arises because "Bigham was arrested the day after he had written his latest letter to the editor criticizing the Sheriff's illegal activities." (Pet. 3; *See also* Pet. 8, 9). Not surprisingly, Petitioner includes no record citation for this statement. In truth, *ten weeks* elapsed between the date of Petitioner's last article criticizing Respondent Huffman (April 30, 1997) and the date of Petitioner's arrest (July 8, 1997). (R. 351-54). Clearly there is no basis for an inference of intentional retaliation.

The second misstatement of fact forms the foundation of this Petition for Writ of Certiorari. Petitioner misstates the District Court's opinion, alleging his First Amendment claim was dismissed for failure to produce "direct evidence" that Petitioner's speech was the cause of his arrest. (Pet. 4-5). Petitioner even states that the Fifth Circuit, which adopted the lower court's opinion in a per curiam decision, "held" that First Amendment retaliation cases required direct

evidence in the form of "statements" or "documents." (Pet. 5-6). As this Honorable Court can clearly see, the District Court's opinion dismissed Petitioner's First Amendment claim, not because Petitioner presented no "direct evidence," but because Petitioner presented no evidence at all that his speech played a role in his arrest. (Pet. App. 6-7). Because Petitioner failed to produce any competent evidence or any genuine issue of material fact that the exercise of his First Amendment rights was a substantial or motivating factor in his arrest, the District Court properly concluded that Petitioner failed to establish a prima facie case of retaliation. (Pet. App. 6-7).

As noted *supra*, Petitioner also misstates the status of the driveway upon which Petitioner trespassed by referring to same as a "public street," "street" or "road." (Pet. 3-4, 6). As Petitioner stipulated in the Pre-Trial Order, however, "The driveway used as a means of reaching the rear entrance of the Clay County Sheriff's Office/jail building has never been dedicated as a public city street or a public county road." (R. 345).

In addition to the foregoing misstatements of fact, Petitioner also makes a misstatement of law that this Court will readily recognize. Petitioner asserts that *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097 (2000), an employment discrimination case, holds that "indirect evidence is sufficient to prove discriminatory intent." (Pet. 5). *Reeves* does not so hold. Rather, *Reeves* makes clear that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude

that the employer unlawfully discriminated." *Reeves*, 120 S. Ct. at 2109. *Reeves* simply does not stand for the proposition Petitioner asserts.[1]

REASONS FOR DENYING THE WRIT

Although stated in two different ways, the sole question presented by the Petition is whether direct evidence is required to prove First Amendment retaliation. This question, however, has already been answered. Direct evidence clearly is *not* required to prove a retaliation case, just as direct evidence is not required to prove a discrimination case. There is no dispute that such claims can be established solely with circumstantial or indirect evidence. A plaintiff must, however, present *some* evidence of retaliation or discrimination. This is where Petitioner's case fails, for Petitioner failed to come forward with any document, statement, exhibit, action, or other form of competent evidence, either direct or indirect, which would demonstrate or give rise to an inference of retaliation. In fact, Petitioner presented no more than his own conclusory allegations of retaliation. Thus, as a matter of law, Petitioner failed to establish his *prima facie* case of retaliation. Summary judgment was therefore properly entered by the District Court and properly affirmed by the Fifth Circuit. Respondent respectfully submits that the Writ should be denied.

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1. Petitioner's counsel was counsel of record in *Reeves*.

I.

THE DISTRICT COURT'S DECISION AND FIFTH CIRCUIT'S AFFIRMANCE THEREOF ARE NOT INCONSISTENT WITH *REEVES v. SANDERSON PLUMBING PRODS., INC.*, 120 S. CT. 2097 (2000).

Petitioner's entire case is based upon erroneous readings of both *Reeves v. Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097 (2000), and the District Court opinion in the instant case. Petitioner claims that *Reeves* "holds that indirect evidence *is* sufficient to prove discriminatory intent." (Pet. 5) (emphasis in original). There are a number of errors with Petitioner's statement. First and foremost, this is not the holding of *Reeves*. *Reeves* held that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 120 S. Ct. at 2109. Nothing in *Reeves* abrogates a plaintiff's responsibility to prove his case with competent evidence. Nothing in *Reeves* allows a plaintiff to proceed to trial solely upon "conclusory and insufficient allegations," which are all Petitioner produced. (Pet. App. 7). In short, nothing in *Reeves* entitles a plaintiff to a trial where he can produce no competent evidence of retaliation. In fact, *Reeves* explicitly states that a plaintiff must initially prove his *prima facie* case and then offer sufficient evidence to find the employer's stated reasons for the decision false, neither of which Petitioner has done in the instant case.

Petitioner sounds the alarm that this Court must stop the Fifth Circuit from continuing to require Plaintiffs to produce "direct evidence." In reality, however, such cry is disingenuous, for the Fifth Circuit clearly does not require plaintiffs to come forward with direct evidence in discrimination or retaliation cases. *See Scott v. University of Mississippi*, 148 F.3d 493, 504 (5th Cir. 1998) (noting plaintiff need not provide direct evidence to sustain jury finding of discrimination); *Stafford v. True Temper Sports*, 123 F.3d 291, 295 (5th Cir. 1997) (finding retaliation claim can be proven with circumstantial evidence).[2] Furthermore, the entire *McDonnell Douglas* burden shifting framework is designed for discrimination cases involving only circumstantial evidence. *Reeves*, 120 S. Ct. at 2105. Thus, when Petitioner presents the question to this Court of whether "First Amendment retaliation cases can be proven by indirect evidence," (Pet. i), the already clear answer to the question under longstanding case law is "yes." Such an affirmative answer, however, does not help this Petitioner's case.

The instant case is not one of direct evidence versus indirect evidence, but rather, is a case of *no evidence at all*. Petitioner wants the jury to "infer" discrimination, but comes forward with no evidence from which to make such an inference. Petitioner's cry of "jury trial" and "reasonable inferences" cannot negate the fact that Petitioner has come forward with no competent evidence to support his claims. Because Petitioner presented no evidence at all that his arrest was motivated by his speech, the District Court properly concluded that Petitioner failed to establish his *prima facie*

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2. Petitioner's counsel served as counsel in both the *Scott* and *Stafford* cases.

case. (Pet. App. 6-7). Through adopting the District Court opinion, the Fifth Circuit also recognized Petitioner's complete failure to come forward with any competent evidence, direct or indirect, to substantiate his claim of First Amendment retaliation. (Pet. App. 6-7). Because Petitioner's failure to come forward with any evidence to support his claims is fatal to his case, Petitioner failed to demonstrate the existence of any genuine issue of material fact, thereby making summary judgment appropriate.

II.

REEVES, WHICH EXPLAINS THE SUFFICIENCY OF EVIDENCE REQUIRED TO SUSTAIN A DISCRIMINATORY TREATMENT CASE, HAS NO APPLICATION TO THIS NON-DISCRIMINATION, NON-TITLE VII CASE.

Reeves, of course, was an employment discrimination case arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. In discriminatory treatment cases, the burden shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), is employed in the order for presentation of proof. *Reeves*, 120 S. Ct. at 2106. Under *McDonnell Douglas*, once the plaintiff proves a *prima facie* case and the defendant then satisfies its burden of articulating legitimate, nondiscriminatory reasons for its employment decision, the burden shifting framework disappears and the sole remaining issue becomes "discrimination *vel non*." *Id.* The *Reeves* case had reached this final stage of proving discrimination, and the issue before this Court was the sufficiency of the evidence required to

establish discrimination at this third level. Therefore, *Reeves* was an explanation of the *McDonnell Douglas* burden shifting framework in discrimination cases.

McDonnell Douglas itself made clear that it addressed "the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253." *McDonnell Douglas Corp.*, 411 U.S. at 793. *See also Reeves*, 120 S. Ct. at 2106 (noting *McDonnell Douglas* establishes allocation of burden of production and order of proof in *discriminatory treatment cases*). The instant Petition, however, does not involve a Title VII case, but rather, is a First Amendment retaliation case. As such, *McDonnell Douglas* does not apply. *See Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121-22 (5th Cir. 1998) (noting *McDonnell Douglas* analysis applies to Title VII discrimination cases, not retaliation claims founded upon violations of constitutional rights); *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982) (noting doubt exists over whether First Amendment retaliation case is ever properly analyzed under *McDonnell Douglas*). Because *McDonnell Douglas* has no application to this First Amendment retaliation case, the holding of *Reeves*, which explains the *McDonnell Douglas* analysis, likewise does not apply.

Even if the holding of *Reeves* did have application to the instant case, *Reeves* is clearly distinguishable, despite Petitioner's assertion to the contrary. (Pet. 6). *Reeves* involved a discrimination claim analyzed under the burden shifting analysis of *McDonnell Douglas*, while the instant case does not involve discrimination or *McDonnell Douglas*, but rather involves a claim of First Amendment retaliation. Additionally, while the *Reeves* plaintiff clearly established a *prima facie* case of discrimination,

the Petitioner herein did not establish a *prima facie* case of retaliation. Further, in the instant case, probable cause existed to arrest Petitioner because Petitioner clearly and willfully committed the offenses of trespassing and disorderly conduct in Respondent Huffman's presence, which violations of law justified Petitioner's arrest. Without question, *Reeves* is distinguishable from the instant case. This Petition, which is solely based upon *Reeves*, should not be granted.

III.

THE FACTS OF THIS CASE DO NOT GIVE RISE TO ANY INFERENCE OF DISCRIMINATION.

What Petitioner asks of this Court is to allow a plaintiff, under the guise of "drawing reasonable inferences," to avoid summary judgment and reach the jury in all cases, whether or not that plaintiff has produced any evidence to support his claim. This much is clear from the last three pages of Petitioner's argument which relate not to the facts of this case, but merely criticize Rule 56 of the Federal Rules of Civil Procedure and the Fifth Circuit Court of Appeals.

The only evidence Petitioner cites in his Petition to support the drawing of any inference of retaliation is again, not evidence at all, but merely two patently false, "conclusory and insufficient allegations." (Pet. App. 7). Petitioner claims "Bigham was arrested the day after he had written his latest letter to the editor criticizing the Sheriff's illegal activities." (Pet. 8). Such statement is undeniably false, for the last letter Petitioner wrote prior to his arrest on July 9, 1997, was a letter published on April 30, 1997, *ten weeks* prior to his arrest. (R. 351-54). The only other claimed basis for an inference of retaliation is Petitioner's

statement that he "was arrested for being on property which everyone else is free to use." (Pet. 8). This statement likewise has no basis in fact. Petitioner admitted in his deposition that he, while chief deputy, told people not to walk upon the driveway behind the Clay County jail building. (R. 133-34). Moreover, Petitioner stipulated in the Pre-Trial Order that the driveway had never been dedicated as a public street or county road. (R. 345). Petitioner therefore has come forward with no evidence sufficient to support an inference of retaliation.

The District Court correctly concluded that Petitioner failed to come forward with any competent evidence. Rather, Petitioner offered only conclusory and insufficient allegations to support his claim of First Amendment retaliation. Despite Petitioner's protestations, the record is clear that he has produced no evidence from which any reasonable inference of retaliation may be drawn. Clearly, then, the District Court did not err in granting Respondent's Motion for Summary Judgment and the Fifth Circuit did not err in affirming such judgment.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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